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No. 711

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

THE BURKE-PARSONS-BOWLBY CORPORATION, ET AL.,
*Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

**On Appeal From the United States District Court for the Southern District of West Virginia**

## REPLY TO MOTIONS TO AFFIRM

GORDON P. MACDOUGALL
705 Ring Building
Washington, D. C. 20036
*Attorney for Appellants*

*Of Counsel:*

GEORGE M. SCOTT
403 Market Street
Spencer, West Virginia 25276

JOHN E. LEE
Public Service Commission
of West Virginia
Capitol Building
Charleston, West Virginia 25305

November, 1967

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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The motions to affirm raise two matters for which appellants submit this reply.

First, the joint motion of the United States and Interstate Commerce Commission inquires as to appellants' position with respect to the Appalachian Regional Development Act. (U.S.—I.C.C. Motion, p. 3, fn. 2) Appellants reply that they are of the view that Congress, having found specifically that the Appalachian Region is deficient in transportation re-

sources,[1] this recent legislation reinforces the requirement of Section 1 (18) of the Interstate Commerce Act that a finding be made as to the probable future demand for rail transportation prior to authorization of any substantial line abandonment.

Second, in response to the Motion of the Baltimore & Ohio Railroad Company (B & O Motion, p. 4), suggesting, mistakenly, that appellants might contend that the Commission is required to make a finding as to the *precise* amount of future traffic over the branch line in question, we wish to state that, in our opinion, it is essential for the Commission to make a finding, not with mathematical exactness, but with a reasonable approximation, of the probable future public demand for rail service in order to satisfy the requirements of the relevant statutes. (5 U.S.C. 1007 (b) and 49 U.S.C. P (18)). The situation here, however, is that the Interstate Commerce Commission failed to make any finding or approximation whatsoever as to future freight demand while it improperly overruled the specific findings relating thereto made by the Hearing Examiner. As the Interstate Commerce Commission notes in its Motion to Affirm (I.C.C. Motion, page 4), the reason given by the Commission was that the "speculative nature of the evidence with respect to future traffic detracts from its probatory effect". By designating this evidence in such an ambivalent manner, the Commission has not come to grips with the evidence before it respecting future traffic potential.

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[1] Appalachian Regional Development Act, P.L. 89-4, 79 Stat. 5, 40 U.S.C. App. 2; The I.C.C. is required to consider legislation, apart from the Interstate Commerce Act, specifically dealing with transportation problems and facilities. (*McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80 (1944))

On the other hand, the agency was most careful to make an approximation of B & O's expense in rehabilitation of the R S & G Branch.

The Motions of both the Interstate Commerce Commission and the Baltimore & Ohio Railroad Company invoke the doctrine of this Court as announced in the early case of *Colorado* v. *U.S.*, 271 U.S. 153. We also rely on that decision. We contend that the Commission cannot possibly balance the equities between the conflicting public and carrier considerations, as contemplated by the *Colorado* decision, and the Appalachian Regional Development Act, without first determining the probable future public demand for rail service in the territory served by the branch line in question. Without such a finding, the requirements of the statutes cannot be met, and the scales of justice cannot be put in balance.

The Motions to Affirm should be denied.

Respectfully submitted,

GORDON P. MACDOUGALL
705 Ring Building
Washington, D. C. 20036
*Attorney for Appellants*

*Of Counsel:*

GEORGE M. SCOTT
403 Market Street
Spencer, West Virginia 25276

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